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Supreme Court, U.S.
FILED
JUL 18 2003
OFFICE OF THE CLERK

No. 02-1705

IN THE

Supreme Court of the United States

BARBARA A. SILBER, *et al.*,

Petitioners,

v.

BARBARA K. SILBER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under ERISA preemption jurisprudence and the statutory scheme for employee pension plan administration, does an explicit, voluntary, good-faith waiver of divorce-driven beneficiary rights and interest in death benefits negotiated as a final settlement under a state court Qualified Domestic Relations Order [QDRO], for which $925,000 in asset value was paid, trump a lingering pre-QDRO beneficiary designation under which the paid ex-wife now recycles a further claim to payment; or, absent a filed redesignation of beneficiary form, does the statute mandate that she get a double windfall payment?

The New York Court of Appeals gave effect to the QDRO as an integrated plan document that eliminated petitioner's beneficiary rights by Waiver.

The petition-posed issue is whether the core ERISA rule reiterated in *Egelhoff v. Egelhoff*, 532 U.S. 141, 150 (2001) — that plans must be administered, and benefits paid in accordance with plan documents — precludes a QDRO-based waiver [*see* 29 U.S.C. Section 1104(a)(1)(D)] and whether uniform plan administration has been undone by the New York Court of Appeals decision.

We think not, and respectfully urge that certiorari is not warranted in this case on any of the grounds asserted in the petition.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Reasons for Denying the Writ	1
I. A QDRO-Contained Waiver Provision Is Consistent With Both The "Plan Documents Rule" And Federal Common-Law Waiver Doctrine, Meets ERISA's Objectives And Does Not Draw The Conflict Asserted In The Petition	1
II. Plan Administration Is Not Compromised By The New York Court Of Appeals Decision	5
III. The New York Court Of Appeals Decision Did Not Reject The Rule In Egelhoff And It Did Not Rely On State Common-law To Uphold QDRO Waiver; The Rule In Egelhoff Is Not "Eviscerated" By The Decision.	6
Conclusion	11

TABLE OF CITED AUTHORITIES

Page

Cases:

Bailey v. Blue Cross & Blue Shield, 67 F.3d 53 (4th Cir. 1995) 2

Brandon v. Traveler's Insurance Co., 18 F.3d 1321 (5th Cir. 1994), *cert denied*, 513 U.S. 1081 (1995) 6-7

Carland v. Metropolitan Life Insurance Co., 935 F.2d 1114 (10th Cir. 1991), *cert. denied*, 502 U.S. 1020 (1991) 2, 3, 4, 11

Egelhoff v. Egelhoff, 332 U.S. 141 (2001) ..... i, 7, 8

Estate of Altobelli v. IBM Corp., 77 F.3d 78 (4th Cir. 1996) 6

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 10

Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir. 1990), (en banc), *cert. denied*, 498 U.S. 820 (1990) 6, 7, 10

Krishna v. Colgate Palmolive Co., 7 F.3d 11 (2nd Cir. 1993) 11

Lyman Lumber Co. v. Hill, 877 F.2d 692 (8th Cir. 1989) 7

Cited Authorities

	Page
Manning v. Hayes, 212 F.3d 866 (5th Cir. 2000), *cert. denied*, 532 U.S. 941 (2001)	6, 7
McMillan v. Parrott, 913 F.2d 310 (6th Cir. 1990)	7
Melton v. Melton, 324 F.3d 941 (7th Cir 2000)	6
Metropolitan Life Ins. Co. v. Bigelow, 283 F.3d 436 (2nd Cir. 2002)	1, 8, 11
Metropolitan Life Ins. Co. v. Pressley, 82 F.3d 126 (6th Cir. 1996)	7
Mohamed v. Kerr, 53 F.3d 911 (8th Cir. 1955), *cert. denied*, 516 U.S. 868 (1995)	7
Rush Prudential HMO Inc. v. Moran, 336 U.S. 355 (2002)	10
United States v. Johnston, 268 U.S. 220 (1925)	5
Statutes:	
29 U.S.C.A. § 1056(d)(1)	1
29 U.S.C.A. § 1056(d)(3)(A)	1
29 U.S.C.A. § 1056(d)(3)(B) (C) and (D)	5
29 U.S.C.A. § 1104(a)(1)(D)	i, 1
29 U.S.C. § 1144(b)(7)	9

REASONS FOR DENYING THE WRIT[1]

I. A QDRO-CONTAINED WAIVER PROVISION IS CONSISTENT WITH BOTH THE "PLAN DOCUMENTS RULE" AND FEDERAL COMMON-LAW WAIVER DOCTRINE, MEETS ERISA'S OBJECTIVES AND DOES NOT DRAW THE CONFLICT ASSERTED IN THE PETITION

The Employee Retirement Income Security Act of 1974 ("ERISA") was amended in 1984 to create the QDRO exception to the rule against pension benefit transfers (see, 29 U.S.C. §§ 1056(d)(1), (3)(A) [Retirement Equity Act of 1984 — Pub. L. 980397; 98 U.S. Stat. 1426(REA)] and was made exempt, as a state court order, from ERISA preemption (*see* 29 U.S.C. § 1144[b][7]); *Metropolitan Life Ins. Co. v. Bigelow*, 283 F.3d 436 (2d Cir. 2002). The QDRO is now an integral part of plan administration — "each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order", 29 U.S.C. § 1056(d)(3)(A). ERISA requires the fiduciary to administer the pension plan in accordance with the documents and instruments governing the plan, 29 U.S.C. § 1104(a)(1)(D).

The primary purpose of QDRO is to facilitate interspousal property distribution and transfer of interests in otherwise inalienable pension assets. Whenever a QDRO embodies a settlement agreement between spousal parties the terms form a binding contract whereby asset value is transferred in exchange for a waiver, renunciation or release of beneficial rights and interest in the plan. The terms are

1. For purposes of opposing the petition respondent relies upon the summary of the facts contained in the opinion below.

given effect by the plan as the incorporated contract of the parties by which they were allowed to chart their own course within ERISA guidelines.

The New York Court of Appeals held that a QDRO, upon filing and acceptance by the plan, itself serves as a plan document that may modify or eliminate beneficiary rights and interest in an ERISA-governed plan, without the need to file a new beneficiary designation form. *See* 99 N.Y.2d 345, 401-402, 405 (Pet. App. 7a, 12a); *Carland v. Metropolitan Life Ins. Co.*, 935 F.2d 1114 (10th Cir. 1991), *cert. denied*, 502 U.S. 1020 (1991).

Petitioner contends that certiorari is warranted, in part, because the New York Court of Appeals found a federal common-law waiver of beneficiary outside of ERISA while ERISA requires payment be made to a beneficiary named under plan documents. This ignores the fact that the subject QDRO was made a plan document by ERISA.

It would lead to an absurd result, impossible of administration, to hold that because ERISA does not specify what laws of contract apply to QDRO that ordinary contract principles cannot be invoked to construe and enforce its terms, conditions and promises or that the plain meaning of language cannot be given effect. Ordinary contract principles apply to ERISA plan document interpretation. *See Bailey v. Blue Cross & Blue Shield*, 67 F.3d 53, 57 (4th Cir. 1995).

To complicate matters further and to point out how unsuitable this case is for a grant of certiorari on the broad issue raised in the petition, it must be noted that the plan contracts themselves provide that a *settlement agreement* acknowledged under plan certificates is to be considered part

of the plan and that the plan administrator is charged with complying with its terms and conditions.

> The interest of any beneficiary, whether revocably or irrevocably named, who does not survive the Participant will vest in the Participant, or the executors or administrators of the Participant, except as otherwise provided herein or in any beneficiary designation or *settlement agreement* in effect under this certificate.

See Record On Appeal below at R151, 154; emphasis added.

Thus, the QDRO, being a "settlement agreement" under the plan documents, must be given effect as part of the plan documents by the very terms of the plan contracts and no conflict with the so-called "Plan Documents Rule" is implicated; no waiver outside of ERISA is squarely involved.

In *Carland v. Metropolitan Life Ins. Co.*, 935 F.2d 1114 (10th Cir. 1991), *cert. denied*, 502 U.S. 1020 (1991), the 10th Circuit upheld an irrevocable beneficiary designation to the ex-wife made in a qualifying divorce judgment QDRO against a subsequent beneficiary change form filed by the ex-husband where the QDRO was delivered to the plan administrators and became part of the plan records.

> . . . Because Metropolitan Life received the divorce decree and was on notice, the company had a duty to consider that decree as part of "the record" in determining the beneficiary of record under this ERISA-governed plan. Metropolitan Life's duty to pay the appropriate beneficiary taking into account the qualifying

> divorce decree, is part of the fiduciary responsibilities Congress referred to in section 1104 of the statute. *See* 29 U.S.C. § 1104.
>
> Metropolitan Life argues ERISA requires a plan administrator to look only at the plan documents to determine the beneficiary of a welfare benefit plan. In summarizing section 1104 as simply requiring fiduciaries to "discharge [their] duties with respect to a plan . . . in accordance with the documents and instruments governing the plan," Metropolitan Life fails to mention Congress included the phrase "*insofar as the instruments are consistent with the provision of this subchapter or subchapter III of this chapter.*" *See* 29 U.S.C. § 1104(a)(1)(D). Blindly paying the proceeds as specified in the insurance company's beneficiary designation forms would be inconsistent with the statutory preemption exception that recognizes the validity of domestic relations orders affecting beneficiary designations. *See* 29 U.S.C. § 1056. Because a divorce decree satisfying the statutory requirements becomes part of the record when a plan receives notice, a plan administrator complying with ERISA must take that decree into account in making a beneficiary determination.

Id. at 1121 (emphasis added).

Petitioner concedes that ERISA permits the designation of plan beneficiaries through a QDRO-plan document (Pet. 19) but argues that ERISA does not permit an existing beneficiary designation to be waived within the QDRO by

the same beneficiary, even as consideration for payment received and obliquely hints that the subject domestic relations order did not meet QDRO requirements (Pet. 19). *See* 29 U.S.C. §§ 1056(d)(3)(B), (C) and (D).[2]

II. PLAN ADMINISTRATION IS NOT COMPROMISED BY THE NEW YORK COURT OF APPEALS DECISION

Whether to designate or waive a beneficial interest, QDRO language must be explicit. There is no presumption that QDRO language (routinely drafted by experienced counsel) will be ambiguous or will not provide clear and capable direction to a plan administrator. Arguments to the contrary are highly speculative.

No extraordinary burden or threat to uniform, predictable or efficient plan administration is presented.

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2. The latter suggestion smacks of a request for error correction of the New York Court of Appeals' finding a valid QDRO. It is axiomatic that the Supreme Court "does not grant a certiorari to review evidence and discuss particular facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925). The QDRO was delivered to the plan administrator, who accepted it, acknowledged it by a separately signed agreement, and agreed to abide by its terms and to incorporate it into the plan documents governing the pensions. It contained all the required information — names and addresses of the Participant, Alternate Payee, Pension Plan, plan contract numbers and percentages of each to be assigned to the Alternate Payee (*See* Record On Appeal below R112-113). It specifically referred to, solely concerned, and operated upon the pension annuities and assets and the Alternate Payee's rights thereafter. There could be no doubt about identification of the subject matter as to which the waiver language was intended to operate.

> No such additional burdens will be imposed because, under the ERISA statutory scheme, a plan administrator must investigate the marital history of a participant and determine whether any domestic relations orders exist that could affect the distribution of benefits. This case arose from just such an investigation. Our decision only requires plan administrators to continue their current practice of thoroughly investigating the marital status of a participant.

Fox Valley & Vicinity Construction Workers Pension Fund v. Brown, 897 F.2d 275, 282 (9th Cir. 1990) (en banc), *cert. denied*, 498 U.S. 820 (1990).

As a practical matter, whether contract language constitutes a waiver usually does not involve disputed questions of fact and is a matter resolved upon summary judgment motion by the court.

III. THE NEW YORK COURT OF APPEALS DECISION DID NOT REJECT THE RULE IN EGELHOFF AND IT DID NOT RELY ON STATE COMMON-LAW TO UPHOLD QDRO WAIVER; THE RULE IN EGELHOFF IS NOT "EVISCERATED" BY THE DECISION.

The cases relied upon by petitioner to support the conflict-among-circuits ground of the petition did not involve QDRO agreements. *See Melton v. Melton*, 324 F.3d 941 (7th Cir. 2003); *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000); *Estate of Altobelli v. IBM Corp.*, 77 F.3d 78 (4th Cir. 1996) (court declined to address whether the domestic relations order was a QDRO); *Brandon v. Travelers Ins. Co.*, 18 F.3d

1321 (5th Cir. 1994) (court declined to address whether divorce decree qualified as QDRO); *Lyman Lumber Co. v. Hill*, 877 F.2d 692 (8th Cir. 1989). Those waiver-containing agreements could not claim status as plan documents or exemption from ERISA preemption. Those decisions were founded solely on recognition of federal common-law waiver doctrine. Therefore, the conflict presented by those cases is squarely outside the QDRO plane, and free of the complication of congressional intent and purposes with respect to the QDRO exception.

This Court has routinely denied certiorari to hear the issue in non-QDRO cases. *See Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Mohamed v. Kerr*, 53 F.3d 911, 914-16 (8th Cir. 1995), *cert. denied*, 516 U.S. 868 (1995); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321 (5th Cir. 1994), *cert. denied*, 513 U.S. 1081 (1995); *Fox Valley Vicinity Construction Workers Pension Fund v. Brown*, 897 F.2d 275 (7th Cir. 1990) (en banc), *cert. denied*, 498 U.S. 820 (1990). There is even stronger reason to deny certiorari here.

Indeed, when this court decided the *Egelhoff* case it noted that certiorari was pending in *Manning v. Hayes*, a case strongly presenting the waiver-over-plan-documents reasoning (decided on other grounds), yet certiorari was ultimately denied. More than twelve years have passed since the Sixth Circuit's decision in *McMillan v. Parrott*, 913 F.2d 310 (6th Cir. 1990) and more than six since its decision in *Metro. Life Ins. v. Pressley*, 82 F.3d 126 (6th Cir. 1996), *cert. denied*, 520 U.S. 1263 (1997) and the split with the Sixth Circuit has not seriously impacted ERISA plan administration on a national level.

In *Egelhoff* this Court invoked ERISA conflict preemption to strike down a State beneficiary-busting statute that automatically revoked any ex-spouse beneficiary designation upon entry of a divorce decree. The main holding is that the plain text of ERISA supersedes and controls over conflicting state law. Petitioner has fixed on the Court's reiteration of the rule in the conflict preemption cases — the fiduciary shall administer in accordance with the documents and instruments governing the plan as a judicial bent against the waiver claim and the source of conflict with the New York Court of Appeals. However, in *Egelhoff*, this Court did not consider, even remotely, the issue of federal common-law waiver as it relates to QDRO or ERISA. QDRO is not a state law in conflict with ERISA, but part of ERISA itself. It does not compel plan administrators to pay benefits to beneficiaries chosen by state law rather than those identified under plan documents. ERISA merely gives to the state court the right of imprimatur to the parties' agreement in effecting alienation of ERISA plan assets — a wholly consistent ERISA objective.

In the post-Egelhoff case of *Metro. Life Ins. Co. v. Bigelow*, 283 F.3d 436 (2d Cir. 2002) the Second Circuit Court of Appeals held that there is no conflict preemption between ERISA and a QDRO beneficiary redesignation (*citing Carland, supra*). The Second Circuit was mindful of *Egelhoff* when it upheld in *Bigelow* a QDRO-mandated irrevocable beneficiary designation and struck the deceased pensioner's contrary plan document beneficiary designation.

> No material facts are in dispute. Rather, the controversy involves solely statutory interpretation — namely, whether ERISA or state law governs the determination of the proper beneficiaries. If ERISA

governs, then the Father, who is the named beneficiary in the Plans' documents, is the proper beneficiary. *See* 29 U.S.C. § 1144(a) (2000). If ERISA does not apply, or if the state-law judgment is exempt from ERISA's preemption provision, then the Daughters, who were designated "irrevocable beneficiaries" in the Stipulation, are the proper beneficiaries. *See Id.* § 1144(b)(7).

Generally, ERISA preempts state laws that "relate to" employee benefits plans. 29 U.S.C. § 1144(a). The Supreme Court has held that "a state law relates to an ERISA plan if it has connection with or reference to such a plan." *Egelhoff v. Egelhoff*, 532 U.S. 141, 147, 149 L.Ed.2d 264, 121 S.Ct. 1322 (2001) (citation and internal quotation marks omitted). To determine whether a state law has a "connection with" an ERISA plan, we look to "the objectives" of ERISA and "to the nature of the effect of the state law on ERISA plans". *Id.* (citation and internal quotation marks omitted). State laws governing the designation of plan beneficiaries, such as the law giving effect to the Judgment, "relate to" employee benefits plans and thus are subject to ERISA preemption. *Id.* at 1327-28; *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 14-16 (2nd Cir. 1993). ERISA, however, creates several exceptions to its general preemption provision, one of which is relevant here: ERISA does not preempt "qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title) . . ." 29 U.S.C. § 1144(b)(7).

* * *

> . . . We therefore join the other circuits to have considered this issue in concluding that the Section 1144(b)(7) exception to ERISA preemption applies to all QDROs, whether they involve either pension or welfare plans. *Metro Life Ins. Co. v. Pettit*, 164 F.3d 857, 863 n.5 (4th Cir.) *Metro Life Ins. Co. v. Wheaton*, 42 F.3d 1080, 1083-1084 (7th Cir. 1994); *Marsh*, 119 F.3d at 421; *Carland v. Metro Life Ins. Co.*, 935 F.2d 1114, 1119-1120 (10th Cir.), *cert denied*, 502 U.S. 1020, 116 L.Ed.2d 761, 112 S.Ct. 670 (1991).

Id. at 6-7.

The New York Court of Appeals did not rely upon New York State common law waiver rules as *ratio decideni* when it simply noted that the federal tripartite test for waiver developed under ERISA jurisprudence is consistent with New York standards (*see* 99 N.Y.2d 395, 404; Pet. App. 10a). While it is clear that where ERISA falls silent on a relevant issue federal common law may be developed to further ERISA jurisprudence [*see Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Rush Prudential HMO Inc. v. Moran*, 536 U.S. 355, 377 (2002)] state common law principles may be utilized in developing federal common law only if federal common law is lacking and the state law is consistent with ERISA policies. *See Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 280 (7th Cir. 1990). Petitioner has raised the false specter of rampant infusion of preempted state law into ERISA jurisprudence. The elements of Waiver are so basic and common that they will not materially vary in state law jurisprudence from the federal tripartite common law test and there appears to be no reason to draw upon them.

IV. THE NEW YORK COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH THE SECOND CIRCUIT

Petitioner cannot rely on the pure dicta in *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11 (2d Cir. 1993) for the assertion that the Second Circuit is now aligned with the Sixth's Plan Documents Rule. In *Krishna* a pensioner sought to change his ERISA life insurance beneficiary designation by a will provision. The decision on the facts is limited to ERISA preemption of state law governing testamentary transfers; no issue of waiver was involved. The cases considered were those holding divorce to automatically vitiate prior beneficiary designation. In light of the Second Circuit's approval in *Bigelow*, *supra*, of *Carland's* recognition that QDRO is to be given effect as a plan document, there may be no real conflict of consequence demonstrated between the New York Court of Appeals and the Second Circuit to bolster this petition.

CONCLUSION

For these reasons, the petition should be denied.

Respectfully submitted,

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